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No. 01-210

Supreme Court, U.S.
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In The

Supreme Court of the United States

SANDRA M. BRUFF,

Petitioner,

v.

NORTH MISSISSIPPI HEALTH SERVICES, INC.;
NORTH MISSISSIPPI MEDICAL CENTER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY ARGUMENT I.

PETITIONER PRESENTED TO THE FIFTH CIRCUIT HER ARGUMENT THAT THE FIFTH CIRCUIT'S STANDARD OF REVIEW FOR JURY VERDICTS CONTRAVENES *REEVES V. SANDERSON PLUMBING PRODUCTS, INC.*, 530 U.S. 133 (2000).

Respondents claim the argument that the Fifth Circuit's method of review of jury verdicts conflicts with *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) was not contained in Petitioner's brief to the Fifth Circuit.

Petitioner's Fifth Circuit brief was filed on June 12, 2000, the very day *Reeves* was decided. In that brief, Petitioner notified the court that *Reeves* was pending in the Supreme Court, Fifth Circuit Appellee's brief, p. 12, fn 12, and Respondents then argued, in its reply brief, that *Reeves* did not change the rule of *Boeing v. Shipman*, 411 F.2d 365 (5th Cir. 1969), and chastised Petitioner for "advocating departure from the *Boeing v. Shipman*"[1] standard of review. Fifth Circuit Appellants' brief, p. 1.

After the Fifth Circuit rendered its opinion for the jury verdict loser by relying on *Boeing v. Shipman* and ignoring *Reeves*, Petitioner then argued in the first eleven (11) pages of her Petition for Rehearing that the Fifth

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[1] The *Boeing v. Shipman* standard of review contravenes *Reeves*. The *Boeing v. Shipman* standard of review does not contain *Reeves'* direction that the court must disregard movant's contradicted evidence and, thus, permits "a reviewing court to compare [weigh] conflicting inferences . . . at variance with the principles clearly stated in Reeves." Professor William V. Dorsaneo, III, *"Re-Examining the Right to Trial by Jury,"* 54 S.M.U. L. Rev. ___, pp. 149-151 (forthcoming).

Circuit had contravened *Reeves* by accepting as true facts which *Reeves* required be disregarded.

The fact that the Fifth Circuit does not regard *Reeves* as the controlling standard on directed verdicts, but continues to adhere to its 1969 precedent in *Boeing v. Shipman*, is also made clear in Professor William V. Dorsaneo, III, *"Re-Examining the Right to Trial by Jury,"* 54 S.M.U. Law Rev. ___, p. 150 (forthcoming):

> Even worse, two Fifth Circuit panel decisions – one regarding Tulane University[2] and the other concerning Mississippi State University[3] – cite *Boeing* as if *Reeves* changed nothing about the process of evidentiary review.

Based on these same Fifth Circuit precedents, another writer has remarked that the "Fifth Circuit was still in denial" concerning *Reeves*.[4]

REPLY ARGUMENT II.

CERTIORARI SHOULD NOT BE DENIED ON THE GROUNDS THAT *REEVES* HAS ALREADY ANSWERED THE QUESTIONS PRESENTED IN THE PETITION.

Respondents argue that Certiorari is unnecessary because *Reeves* has already stated "the limits . . . on an appeals court's authority to set aside a jury verdict."

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[2] *Rubenstein v. Administrators of the Tulane Educ. Fund*, 218 F.3d 392, 401 (5th Cir. 2000).

[3] *Vadie v. Mississippi State University*, 218 F.3d 365, 372 (5th Cir. 2000).

[4] Alison Jones, 48 Louisiana L. Rev. 6, 512 (Feb. 2001).

Respondents' brief, p. 7. While *Reeves* did "state limits on a court's authority to set aside a jury verdict," the Fifth Circuit disregarded those limits. Petitioner's Petition for Rehearing describes many instances in which the appeals court accepted facts which were contradicted by Petitioner (non-movant's evidence) all in contravention of *Reeves*. Petitioner's Fifth Circuit's Petition for Rehearing, pp. 1-11. When an appellate court, in granting judgment as a matter of law, fails to cite a controlling Supreme Court precedent and violates the principles which that precedent established, exercise of this Court's supervisory authority under Rule 10 is appropriate.

Additionally, *Reeves* did not address the primary issue in this case which involves the Seventh Amendment's "Re-Examination Clause." *Reeves*, 530 U.S. at 550 and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251 (1986) both state that the Rule 56 summary judgment standard "mirrors" the Rule 50 judgment as a matter of law standard. However, the Re-Examination Clause which affects the Rule 50 standard but has no bearing on the Rule 56 standard is not mentioned. An essential issue here is whether the Seventh Amendment's Re-Examination Clause, limiting appellate review to the rules of the common law, permits an appeals court to overrule a jury verdict and render judgment for the jury verdict loser whenever it finds, without following *Reeves'* direction to disregard the movant's contradicted evidence, that the jury was not "reasonable." This rule simply departs too far from the common law rule as to be constitutional. As stated in *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. 433, 447-448 (1830):

> This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner. The only modes known to the common law to re-examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a *venire facias de novo*, by an appellate court, for some error of law which intervened in the proceedings.

The Fifth Circuit's practice of conducting whole record review and disregarding *Reeves* by accepting facts alleged by movant which are contradicted by non-movant's facts, and then rendering judgment for the jury verdict loser on the grounds that the jury was not "reasonable," is irreconcilable with the common law rule of no appellate review at all of the sufficiency of the evidence to support a jury verdict. That the appellate courts have gone way too far in reversing jury verdicts as "unreasonable" is proven by the statistics cited in the appendix to Petitioner's brief, and is also documented by a recent academic study. *See* Kevin M. Claymont and Theodore Eisenburg, *Plantiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments,"* ___ Univ. Ill. L. Rev. ___, pp. 2-3 (forthcoming); and is condemned by Charles A. Wright, *"The Doubtful Omniscience of Appellate Courts,"* 41 Minn. L. Rev. 751, 782 (1957) ("The best way to do justice in the long run is to confine to a minimum appellate tampering with the work of the trial courts").

That appellate courts have gone way beyond "minimum tampering" with jury verdicts is documented in the forthcoming fall 2001 Southern Methodist University Law

Review, which devotes a special issue to the diminishing right to trial by jury. An article by Professor William V. Dorsaneo, III, *"Re-Examining the Right to Trial by Jury,"* 54 S.M.U. L. Rev. ___ (forthcoming), argues Petitioner's point that *Boeing v. Shipman* is at "variance with the principles clearly stated in *Reeves,*" and calls for *Boeing* to be rejected. *Id.* at 137.

Nearly as important as the Fifth Circuit's disregarding *Reeves* and enunciating a standard that cannot be reconciled with the Seventh Amendment's Re-Examination Clause is the fact that the decision in this case also invades the jury's function by characterizing fact issues as legal issues. The Fifth Circuit held, as a matter of law, that it was an "undue hardship" to keep Petitioner in the EAP Unit. This ignored Petitioner's evidence that there was no lawful hardship at all since the legal ethics of Petitioner's profession required her to refer patients whose beliefs conflicted with hers. Labeling issues of fact as issues of law is another infringement on the Seventh Amendment right to jury trial described by Professor Dorsaneo:

> . . . The first important right [inherent in the Seventh Amendment] is the right to have a jury decide whether the defendant's conduct violated or conformed to the applicable legal standard, rather than only more basic factual questions about "what happened." . . .

Id. at 108-109.

. . .

> It would be a sad irony if the reexamination clause of the Seventh Amendment caused federal appellate courts to routinely recharacterize

> questions of fact as law questions to facilitate or justify appellate review. As Professor Wright and others have reasoned, recasting fact questions as law questions is really an obvious subterfuge.[5]

Id. at 189.

CONCLUSION

As Chief Justice Rehnquist wrote in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343 (1979):

> The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary.

The shocking rates at which appellate courts are setting aside jury verdicts as not being "reasonable" is the subject of such national attention that it has sparked a full issue in the forthcoming fall 2001 issue of the Southern Methodist University Law Review; inspired an entire series of national newspaper columns;[6] and ignited protest from one of the Fifth Circuit's own district judges,

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[5] Charles A. Wright, Arthur R. Miller and Mary Kay Kane, *Federal Practice & Procedure*, § 2819, at 202-03 (2d ed. 1995) ("This argument is so purely verbal, and its implications for the Seventh Amendment so plainly devastating, that it has been rejected even by those who support appellate review of those orders.").

[6] *See also* Victoria A. Farrar-Myers, *"Echoes of the Founding: Modern Day Jury as Conferrer of Legitimacy,"* ___ S.M.U. L. Rev.

Sam Sparks, *Fifth Circuit's District Judge's Newsletter*, April 2001, App. 43 to Petition for Writ of Certiorari.

At this time of national crisis, this case addresses two (2) of this nation's most important rights – rights which differentiate it from those of our attacker – the right to trial by jury and the right to religious freedom.

Respectfully submitted,

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___ (forthcoming); The Dallas Morning News series *JURIES ON TRIAL, Right to Trial Faces Under Court Rulings, and Powershift: Laws are Snatching Authority From Jurors and Transferring it to the Hands of Judges*, both May 7, 2000; New York Times, March 2, 2001, *Juries, Their Powers Under Siege, Find Their Role is Being Eroded* states that "scholars argue that appeals judges are now substituting their own opinions for those of jurors."